

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 DON KING PRODUCTIONS, INC.,

4 Plaintiff,

5 v.

6 EL MANGOITO, et al.,

7 Defendants.

Civil No. 05-1192 (JAF)

8 **O R D E R**

9 Plaintiff, Don King Productions, brings this action against
10 sixteen businesses (restaurants, hotels, and/or bars), the owners of
11 the businesses, and the owners' spouses and respective conjugal
12 partnerships, alleging the unauthorized exhibition of Plaintiff's
13 copyrighted boxing match ("the Event") in violation of the Federal
14 Communications Act, 47 U.S.C. § 605 (2001 & Supp. 2005). Docket
15 Document Nos. 1, 31 (amended). Defendants Hacienda Restaurante
16 Gaby's World, Gaby's World, Inc. d/b/a El Caballito de Gaby's World,
17 Gabriel Roura Seda, and Ileana Vélez Seda (collectively, "Defendant
18 Hacienda") bring a counterclaim against Plaintiff, alleging that the
19 complaint was brought in bad faith and under fraudulent pretenses.
20 Docket Document No. 32. Plaintiff moves to dismiss for failure to
21 state a claim. Docket Document No. 34.

22 Defendant Hacienda did not specify a Commonwealth or federal
23 statute under which it seeks counterclaim relief. Docket Document

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1 No. 32. Arguing for dismissal of the counterclaim, Plaintiff avers
2 that neither the Communications Act nor Puerto Rico statutory law
3 provide relief for malicious prosecution. Docket Document No. 34.
4 We agree.

5 Under Federal Rule of Civil Procedure 12(b)(6), a party may move
6 to dismiss an action against him based solely on the pleadings for
7 the claimant's "failure to state a claim upon which relief can be
8 granted." FED. R. CIV. P. 12(b)(6). "Given the Federal Rules'
9 simplified standard for pleading, '[a] court may dismiss a complaint
10 only if it is clear that no relief could be granted under any set of
11 facts that could be proved consistent with the allegations.'"
12 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (quoting Hishon
13 v. King & Spalding, 467 U.S. 69, 73 (1984)). Even under the
14 simplified pleading standard, we find that Defendant's counterclaim
15 fails to state a claim upon which relief can be granted.

16 A party may seek relief through a federal statute "only if such
17 right arises (1) through the affirmative creation of a right of
18 action by Congress, either expressly or implicitly, or (2) via the
19 power of the courts to formulate federal common law." Mortgages, Inc.
20 v. U.S. Dist. Court for Dist. of Nev., 934 F.2d 209, 212 (9th Cir.
21 1991). The Communications Act does not create a right of action for
22 malicious prosecution. 47 U.S.C. § 605. While "federal courts may
23 formulate federal common law in those areas dominated by strong
24 national or federal concerns such as controversies between states,

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1 admiralty matters, or foreign relations," none of these interests are
2 implicated here. Id., 934 F.2d at 213. As "federal courts no longer
3 create private rights of action without support in either the
4 statutory text or the legislative history," Levit v. Ingersoll Rand
5 Financial Corp., 874 F.2d 1186, 1191 (7th Cir. 1989) (citing
6 Karahalios v. Fed. Employees Union, 489 U.S. 527 (1989)), we will not
7 create a right of action that has never before been mentioned,
8 recognized, or in any way construed under the Communications Act.

9 The Puerto Rico Civil Code only provides tort relief for
10 malicious criminal prosecution. P.R. LAWS ANN. tit. 31, § 5141 (1990
11 & Supp. 2004). "The four essential elements of the malicious
12 prosecution tort are: (1) the criminal action was initiated and
13 instigated by the defendant; (2) the criminal action terminated in
14 favor of the plaintiffs; (3) the defendant initiated the action with
15 malice and without probable cause; and (4) as a consequence, the
16 plaintiffs suffered damages." Rivera-Marcano v. Nor meat Royal Dane
17 Quality, 998 F.2d 34, 37 (1st Cir. 1993) (citing Ocasio v. Rosa, 88
18 J.T.S. 42 (1988)). The underlying cause of action in this case is
19 not a criminal prosecution, and so Commonwealth law provides no cause
20 of action to support Defendant Hacienda's counterclaim.

21 For the reasons stated herein, Plaintiff's motion to dismiss
22 Defendant Hacienda's counterclaim is **GRANTED**. Docket Document No. 34.
23 Partial judgment shall be entered accordingly.

24 **IT IS SO ORDERED.**

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1 San Juan, Puerto Rico, this 25th day of January, 2006.
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3 S/José Antonio Fusté
4 JOSE ANTONIO FUSTE
 Chief U. S. District Judge